IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1553

COUNTY OF LOS ANGELES, et al.,

Petitioners,

v.

VAN DAVIS, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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BRIEF AMICUS CURIAE FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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INTEREST OF AMICUS

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation established under the laws of the State of New York. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes

include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in employment discrimination litigation before this Court and the lower courts. The Legal Defense Fund believes that its experience in employment discrimination litigation may be of assistance to the Court.[1/]

SUMMARY OF ARGUMENT

The "racial quota hiring order" that is the subject of Question 2 has never been implemented as such. Instead the petitioners, in compliance with an unchallenged portion of the district court's injunction, have deliberately interviewed large numbers of minority applicants. But the actual rating and hiring decisions are made without regard to race. Because this affirmative action in interviewing consistently results

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1/ Letters of consent to the filing of this brief have been filed with the Clerk.

in hiring blacks and Mexican-Americans in numbers greater than the "racial quota hiring order", that order has never been, and is unlikely to become, operative.

The 1866 Civil Rights Act forbids racially neutral practices which perpetuate the effect of past discrimination. The relevant provisions of the Black Codes, which the Civil Rights Act was intended to annul, were generally neutral on their face, and penalized newly freed slaves by perpetuating past discrimination. Petitioners' written examinations perpetuate the effects of widespread de jure discrimination in the California schools. Gaston County v. United States, 395 U.S 285 (1969).

ARGUMENT

1. THE "RACIAL QUOTA HIRING ORDER" HAS NOT IN FACT BEEN APPLIED TO PETITIONERS, AND QUESTION TWO IS THUS NOT ACTUALLY PRESENTED BY THIS CASE.

The second Question Presented contained in the petition relates to whether the district court erred in imposing "a racial quota hiring order." Petitioners' statement of the case recites that after finding liability,

> [a]s a remedy, the [district] court ordered that the County hire all future entry level firemen in accordance with a hiring quota of 20% black and 20% Mexican-American until such time as the percentage representation of those minorities in the entire Fire Department in all ranks equaled their representation in the County's general population. Brief for Petitioners, p.6.

Petitioners further state that after 1972,

> [a]ll subsequent hiring has been pursuant to the trial court's 40% preferential minority hiring order of July, 1973. Brief for Petitioners, p. 9.

The clear implication of these assertions is that the "quota hiring order" was the sole injunction entered by the district court, that it was an unconditional order, and that petitioners complied with that order by establishing a rigid quota system, consciously hiring, regardless of ability, 1 black and 1 Mexican-American for every 3 whites. The facts appear to be otherwise.

The district court's decision contains four primary substantive requirements, of which only the first two are unconditional. Paragraph one is a general injunction against discrimination. Paragraph two mandates in general language that petitioners take steps to increase minority employment, but contains no specific direction as to how this is to be done.

> Defendants shall in good faith make all affirmative action efforts reasonably possible and necessary to increase the black and Mexican-American participation rates in the fireman workforce at the Los Angeles County Fire Department until such time as those participation rates are commensurate with the black and Mexican-American population percentages of Los Angeles County.

What is "reasonably possible and necessary" is left to the discretion of the petitioners; paragraph two does not itself mandate a quota or any form of race-conscious hiring. Certiorari was not sought as to the propriety of the injunctive provisions of paragraphs one and two. Paragraphs three and four state that "a minimum of twenty percent (20%) of all new employees . . . shall be blacks" and Chicanos. But paragraphs three and four are obviously of no operative significance if the actions taken to comply with paragraphs one and two result in minority hiring over the 40% floor. Thus paragraphs three and four are contingent in nature; so long as compliance with paragraphs one and two is resulting in substantial minority hiring, paragraphs three and four do not apply and impose no additional obligation on petitioners.

That is precisely what has occurred in this case. The hiring procedure adopted by petitioners to comply with paragraphs one and two is as follows. To fill each group of vacancies petitioners interview 500 applicants who passed their written examination, including the highest scoring 300 whites, 100 blacks and 100 Mexican--Americans. The number of whites interviewed is several times the number of actual vacancies. The interviewers rate each of these applicants on his or her merits without regard to race or national origin. Thereafter applicants are hired solely on the basis of the score given by the interviewer, again without regard to race or national origin. The actual hires are not from separate lists, no quotas are used, and the same rating standards are applied to all applicants. The interviewers are not authorized to give extra points because of an applicant's race or national origin, but are directed only to be alert for talented minority applicants. This racially neutral procedure, adopted pursuant to paragraphs one and two, has resulted in every year since 1972 in a minority hiring level which consistently, though by varying amounts, exceeded 50%. Thus paragraphs three and four simply have never gone into effect.

Petitioners do not contend that their present hiring procedure is likely in the future to result in a lower level of minority hiring, and there is nothing in the record suggesting that this will occur. Indeed, at the present rate of hiring, minority employment at the Los Angeles Fire Department is likely to reach population levels by around 1981, at which time the entire injunction will become inoperative. Nor do petitioners assert that, even if they should prevail on the liability issue, they would alter their present procedures. Compare DeFunis v. Odegaard, 416 U.S. 312 (1974). It is thus unlikely that an advisory opinion by this Court with regard to the propriety of paragraphs three and four would ever have any impact on the outcome of this litigation or the conduct of the petitioners.

Under these circumstances the dispute as to whether the district court order should have included paragraphs three and four seems moot. This aspect of "[t]he case has . . . lost its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract questions of law." Hall v. Beals, 396 U.S. 45, 48 (1969). There may

be a remote possibility that some peculiar turn of events might render operative the disputed paragraphs prior to their expiration in two or three years, "[b]ut such speculative contingencies afford no basis for . . . passing on the substantive issues" which petitioners would have the Court decide. Id. at 49. Even if these circumstances fall short of mootness, they are very different than those suggested by the Petition. We do not think certiorari would have been granted had it been clear that the relevance of this issue to the parties was at best "wholly conjectural." Golden v. Zwickler, 394 U.S. 103, 109 (1969). Accordingly we suggest that the grant of certiorari as to Question 2 appears to have been improvident.

Even if the district court had issued an unconditional order directing that firemen be hired on the basis of a quota, that relief would have been justified by the serious and long standing violation of 42 U.S.C. §1981 involved in this case.

II. PETITIONERS' HIRING PRACTICES PERPETUATED THE EFFECT OF PAST DISCRIMINATION IN VIOLATION OF 42 U.S.C. §1981.

The parties urge the Court to decide whether section 1981 prohibits non-job related employment criteria with an adverse impact on minorities, a prohibition already contained in Title VII in light of Griggs v. Duke Power Co., 401 U.S. 158 (1971). They assume that this difficult issue turns on whether section 1981 should be construed in pari materia with Title VII or with the Fourteenth Amendment. Amicus suggests that the Griggs issue need not be reached, since section 1981 clearly forbids practices which have the effect of perpetuating past intentional discrimination, and the hiring practices in this case had just that effect. We further suggest that questions regarding construction of section 1981 cannot, in general, be resolved by simply seeking to analogize it to either the Fourteenth Amendment or Title VII.

Petitioners' assertion that Congress intended the substantive requirements of section 1981 to be the same as those of section 1 of the Fourteenth Amendment is refuted by the very language and established construction of those provisions. In important areas the Amendment is

broader than section 1981. The equal protection clause forbids discrimination generally; Congress expressly considered and rejected proposals to include such a provision in the 1866 Civil Rights Act.[2] The Fourteenth Amendment also guarantees due process of law and "the privileges and immunities of citizens of the United States," but section 1981 contains no such protections. On the other hand, section 1981 prohibits discrimination by private parties in a variety of specific areas, Runyon v. McCrary, 427 U.S. 160 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), but the Fourteenth Amendment does not. Section 1981 was originally enacted as part of section 1 of the 1866 Civil Rights Act to enforce the Thirteenth Amendment. Although the 1866 Civil Rights Act was subsequently reenacted in 1870 after the adoption of the Fourteenth Amendment, this was done, not to make the Fourteenth Amendment the sole basis of the 1866 Act, but to expand the group protected by the Act from "citizens of the United States"[3] to "all persons within the

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2/ See Cong. Globe, 39th Cong., 1st Sess., pp. 1266 (remarks of Rep. Bingham), 1366 (remarks of Rep. Wilson).

3/ 14 Stat. 27.

jurisdiction of the United States" in order to protect aliens, particularly Chinese in California.[4]

The most important connection between the 1866 Civil Rights Act and the Fourteenth Amendment is that they were enacted by the same Congress only two months apart, and that one of the primary purposes of the Amendment was to incorporate certain of the guarantees of the Act into the Constitution. Hurd v. Hodge, 334 U.S. 24, 32 (1948). Because both enactments "were expressions of the same general congressional policy," id., section 1981 should be construed, as to the specific subjects to which it applies, at least as broadly as the Fourteenth Amendment. But since Congress clearly intended that in certain respects the statute would be broader than the Fourteenth Amendment, limitations as to the scope of the Amendment cannot automatically be read into section 1981 itself.

4/ Cong. Globe, 41st Cong., 2d Sess., p. 3658. Senator Stewart explained that under the bill "We will protect Chinese aliens or any other aliens whom we allow to come here, and give them a hearing in our court; let them sue and be sued; let them be protected by all the laws and the same laws that other men are." See also id. p. 3807. The proposal to reenact the 1866 Act was originally part of S. No. 865, id. p. 3409, which was referred to at the time as "The Chinese bill." Id. p. 3702 (remarks of Sen. Thurman).

On the other hand, the 1866 Act in many instances cannot be construed simply by referring to other civil rights legislation. First, there may be several other civil rights statutes covering the same subject matter which may not set identical substantive or procedural standards. In the instant case, although Title VII does not require proof of discriminatory intent, Title VI, which also applies to hiring under certain circumstances, may establish a different rule, see Regents of University of California v. Bakke, 57 L.Ed.2d 750, 767-69, 795-803 (1978), and the anti-discrimination provision of the Revenue Sharing Act, 31 U.S.C. §1242(a), could have even another meaning. Similarly, if a dispute arose as to whether the principle of respondeat superior should be applied in a section 1981 case, reference could be made to 42 U.S.C. §1983, which rejects that principle, Monell v. Department of Social Services, 56 L.Ed.2d 611, 636-38 (1978), or to Title VII which applies it.[5/] Second, it was the clear intent of Congress in adopting Title VII not to repeal any pre-existing rights under other statutes. Both in 1964 and in 1972 Congress rejected proposals to make Title VII the exclusive

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5/ See, e.g., Reyes v. Matthews, 428 F.Supp. 300, 301 (D.D.C. 1976).

prohibition against employment discrimination.[6/] In 1972 opponents of such a proposal expressly referred to the 1866 Civil Rights Act and argued that it was needed since "employees are not fully protected" by Title VII because of the restrictions written into Title VII to assure its passage.[7/] In 1964 a Justice Department memorandum placed in the Congressional Record by Senator Clark stated "[T]itle VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State Statutes".[8/] Thus while the in pari materia rule may be used where it would have a possibly expansive impact on section 1981, that rule cannot be relied on to read into section 1981 either the substantive[9/] or procedural[10/] limitations of Title VII.

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6. See 118 Cong. Rec. 3964-65 (1972); 110 Cong. Rec. 13650-52 (1964); Runyon v. McCrary, 427 U.S. at 174-75; Alexander v. Gardner-Denver Co., 415 U.S. 36, 48, n.9 (1974).

7/ 118 Cong. Rec. 3372 (remarks of Sen. Williams), 3962 (remarks of Sen. Javits).

8/ 110 Cong. Rec. 7207.

9/ See, e.g., 42 U.S.C. §§2000e(b), 2000e-1, 2000e-2(f), 2000e-2(h), 2000e-2(i), 2000e-2(j).

10/ See, e.g., 42 U.S.C. §§2000e-5(c), 2000e-5(e), 2000e-5(f), 2000e-5(g).

The language of section 1 of the 1866 Civil Rights Act does not expressly limit its protections to cases of intentional discrimination. It provides that all "citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude ... shall have the same right ... to make and enforce contracts .... as is enjoyed by white citizens."[11/] Grammatically the references to race and previous servitude merely explain who is included within the protection of the statute, not what rights are conferred. Cf. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 288 (1976). Section 2 of the Act, which clearly did have a particular intent requirement, referred to penalties on any person "on account of such person having at any time been held in a condition of slavery" or "by reason of his race or color", but this terminology is not used in section 1. Similarly, the phrase "because of race or color" was used in section 14

11/ 14 Stat. 27.

of the Freedmen's Bureau Act of 1866[12/] to indicate an intent requirement. The broader language of section 1 of the Civil Rights Act was not, we suggest, "a mere slip of the legislative pen." Jones v. Alfred Mayer Co., 392 U.S. 409, 427 (1968). The reference to the rights actually "enjoyed" by whites, instead of a mere requirement that there be no express difference in rights, contemplates on its face equality in the practical consequences of rights. This is consistent with Senator Trumbull's assertion when introducing the bill that "[t]here is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits."[13/]

The one undisputed goal of Congress in enacting the Civil Rights Act was "eliminating the infamous Black Codes." Jones v. Alfred Mayer Co., 392 U.S. 409, 433 (1978). The codes were ex-

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12/ 14 Stat. 177.

13/ Cong. Globe, 39th Cong., 1st Sess., 474.

pressly referred to by both the House[14/] and Senate[15/] sponsors of the Act. In responding to President Johnson's veto message, Senator Trumbull insisted that it was these "oppressive" laws which made legislation necessary.[16/] Congress was thoroughly familiar with the details of these Codes; they were quoted on the floor and the status of legislation in each state was the subject of repeated discussions.[17/] Congress clearly understood that if the Civil Rights Acts were passed those Codes would be "annulled".[18/] Accordingly the terms and nature of the Black Codes themselves are of substantial importance in determining the intent of Congress.

The Civil Rights Act guarantees blacks the right to "make ... contracts" and Congressman Thayer complained that the Black Codes "impair [freedmens'] ability to make contracts for labor

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14/ Id. pp. 39, 40, 41 (remarks of Rep. Wilson).

15/ Id. pp. 474, 475 (remarks of Sen. Trumbull).

16/ Id. p. 1759.

17/ See nn. 14-16, infra; see also id. pp. 1118-19, 1123-25, 1151-53, 1159-60, 1838, 1839.

18/ Id. pp. 39, 40, 41, 111 (remarks of Rep. Wilson).

in such a manner as virtually to deprive them of the power of making such contracts."[19/] None of the Black Codes, however, literally forbade blacks from making labor contracts; on the contrary, they contemplated that such contracts would be made and frequently required that they be in writing,[20/] a practice encouraged by the Freedmen's Bureau. The provisions of the Codes with which Congress was concerned affected freedom of contract in a different manner, and were generally racially neutral on their face, though not in their effect. The provisions most repeatedly objected to by Congress were the vagrancy laws.[21/] These statutes defined vagrants in such a broad way as to include virtually any adult black who was not gainfully employed, and provided that any person convicted of vagrancy could be punished by being bound out

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19/ Cong. Globe, 39th Cong, 1st Sess., p. 1151.

20/ W. Fleming, Documentary History of Reconstruction, v.1, pp. 288 (Mississippi), 299 (South Carolina); E. McPherson, Political History of the United States of America During The Period Of Reconstruction, p. 39 (Florida).

21/ See Cong. Globe, 39th Cong., 1st Sess., pp. 504 (remarks of Sen. Howard), 1123, 1124 (remarks of Rep. Cook), 1151 (remarks of Rep. Thayer), 1160 (remarks of Rep. Windom).

to any person for a period of up to one year.[22] Of the five such laws, however, four contained no reference to race, and literally applied to whites as well as blacks. In Mississippi the general definition of vagrancy applied to everyone, but the law also deemed as vagrants freedmen, regardless of their employment, who were "found unlawfully assembling together", but even in that case whites assembling with the freedmen were also considered vagrants.[23]

Second in importance to the vagrancy laws were state laws regulating the terms and conditions of employment.[24] These provided, inter alia, that an employee's wages would be forfeited if he did not complete the term of his contract, that he could be fined by his employer for disobedience, being "absent from home without leave", or for injuries to tools and animals. No visitors

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22/ McPherson, supra, pp. 30 (Mississippi), 33 (Georgia), 39 (Florida), 41 (Virginia), 43-44 (Louisiana).

23/ Fleming, supra, p. 284. In addition only black vagrants could be hired out to earn their fines. Id. p. 285.

24/ See Cong. Rec., 39th Cong., 1st Sess., 39 (remarks of Rep. Wilson) (provisions of Georgia regulations condemned as "degrading and arbitrary").

could be received during working hours and no livestock kept without the employer's permission.[25] Disobedience by an employee was a criminal offense, and the employer could have a worker whipped for "want of respect and civility to himself, his family, guests or agents".[26] Most states made it a crime to induce an employee away from his job, thus effectively locking him into working for his old master[27] for at least the term of each contract, and in South Carolina an employee could not contract with a new employer "without production of the discharge of his former master."[28] These onerous regulations, in the case of South Carolina, Alabama, and Louisiana, literally applied to all laborers regardless of race; in Mississippi and Florida, on the other hand, they applied only to blacks.

25/ See, e.g., McPherson, supra, p. 39 (Florida).

26/ See, e.g., Fleming, supra, p. 301 (South Carolina).

27/ See, e.g., McPherson, supra, pp. 31 (Mississippi), 34 (Alabama), 40 (Florida), 43 (Louisiana); Fleming, supra, pp. 287-9 (Mississippi), 302 (South Carolina).

28/ Fleming, supra, p. 30-2.

Third, South Carolina and Mississippi established by statute apparently harsh rules regarding the relationship of masters and apprentices, but in general these provisions applied regardless of race.[29/]

Thus the provisions of the Black Codes which restricted the right of freedmen to contract did so in most instances in a racially neutral manner. Congress, however, had no doubt that adoption of the Civil Rights Act would be sufficient by itself to abrogate the Codes. Nothing in the legislative history suggests that Congress assumed the Codes would remain in effect unless and until it was proved at trial that they had been adopted to discriminate against blacks; indeed, under the then applicable decisions of this Court an inquiry into the motives of a legislature would have been impermissible. Fletcher v. Peck, 6 Cranch. 87, 130 (1810); Ex

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29/ Id, pp. 282-83 (Mississippi), 297-99 (South Carolina). Mississippi, but not South Carolina, authorized local courts to apprentice out black children whose parents could not or would not support them. South Carolina, but not Mississippi, required that an artisan who needed a license to practice his trade must also obtain a license for a black, but apparently not a white, apprentice.

parte McCardle, 7 Wall. 506, 514 (1869).[30/] To the extent that the Thirty-Ninth Congress discussed the purposes of southern legislatures, it was concerned with a continued spirit of insurrection and a desire to preserve slavery;[31/] certainly proof of that sort of motivation is not required to establish a violation of section 1981.

The characteristic of the Black Codes which placed them squarely within the prohibitions of the Civil Rights Act, and which was the central reason for congressional action, was that "under other names and in other forms a system of involuntary servitude [was] perpetuated over this unfortunate race."[32/] The social conditions

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30/ This rule was adhered to as recently as Palmer v. Thompson, 403 U.S. 217, 224-25 (1971). Although Palmer indicates, and Washington v. Davis, 426 U.S. 229 (1976), holds that an inquiry into legislative motive may be necessary, and hence permissible, under the Fourteenth Amendment, that Amendment was not ratified until two years after passage of the 1866 Civil Rights Act.

31/ Id., pp. 1839 (remarks of Sen. Clarke), 1785 (remarks of Sen. Stewart).

32/ Id., p. 1124 (remarks of Rep. Cook)(Emphasis added).

extant before the adoption of the Thirteenth Amendment were "perpetuated" in two senses. First, the restrictions in fact suffered by blacks were similar if not identical to those imposed in an expressly racial manner by the old slave codes.[33/] Second, the racially neutral provisions of the then Black Codes bore primarily on blacks because of the social and economic consequences of the recently ended discriminatory laws and economic system of the slave states. Thus Senator Clarke asserted the Codes would "virtually make serfs of the persons that the constitutional amendment made free".[34/] Representative Thayer felt the Codes would "retain [freedmen] in a state of real servitude".[35/] Representative Cook urged the Codes would "virtually reenslave" the blacks,[36/] and Representative Wilson felt that under them blacks were "practically slaves".[37/] Since Congress was con-

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33/ Id. p. 474 (remarks of Sen. Trumbull).

34/ Id. p. 18[illegible].

35/ Id. p. 1151.

36/ Id. p. 1124.

37/ Id. p. 41.

cerned with the practical consequences of the Black Codes, it naturally regarded the vagrancy and labor regulation laws, whose harsh impact fell primarily on former slaves, as depriving them of "the same right ... to make and enforce contracts ... as is enjoyed by white citizens."

The other rights with which the Civil Rights Act was concerned were generally dealt with by the southern states, if at all, in an expressly racial manner, but these provisions were less common and of less practical importance than the labor and vagrancy portions of the Black Codes. No example was cited during the debates of a Black Code which limited the right of freedmen to sue and be parties; this clause appears to have been added because there were such restrictions in the old Slave Codes,[38/] but the Black Codes that mention the right to sue and be sued all expressly

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38/ Senator Sherman urged that this right be protected because a man would not "be free without the right to sue and be sued, to plead and be impleaded." Cong. Globe, 39th Cong., 1st Sess. 41.

gave that right to blacks.[39] No limitations appear to have existed with regard to personal property. The limitations on the ownership of real property were expressly racial, but so far as we have been able to ascertain these existed only in Mississippi[40] and certain localities within Louisiana.[41] In general state laws provided for the same criminal penalties for blacks and whites,[42] except that the rape of a white woman by a black man was often the subject of a heavier penalty.[43] Those Codes dealing with testimony by freedmen either allowed it in all

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39/ McPherson, supra pp. 29 (North Carolina), 31 (Mississippi), 321 (Georgia), 33 (Alabama), 34 (South Carolina), 42 (Tennessee), 43 (Texas); Fleming, supra, p. 274 (Arkansas).

40/ McPherson, supra, p. 31.

41/ McPherson, supra, p. 279 (parish of St. Landry); W. Fleming, Documents Relating to Reconstruction, p. 31 (town of Opelousas)(hereinafter cited as "Documents").

42/ McPherson, supra, p. 33 (Georgia); Fleming, supra, pp. 289 (Mississippi), 293 (North Carolina).

43/ Fleming, supra, p. 293 (North Carolina); McPherson, supra, p. 34 (South Carolina).

cases[44] or in any case where a black was a party or had an interest.[45] On the other hand, the Black Codes contained numerous other forms of expressly racial discrimination which were not dealt with by the Civil Rights Act, including prohibitions against blacks owning guns,[46] co-habiting with whites,[47] attending white public schools,[48] serving on juries[49] and voting.[50] Thus while the Civil Rights Act clearly prohibited intentional racial discrimination in the areas with which it was concerned, the greatest practical impact of nullifying the Black Codes, as Congress

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44/ Fleming, supra, pp. 274 (Arkansas), 275 (Alabama); McPherson, supra, p. 42 (Tennessee).

45/ McPherson, supra, p. 29 (North Carolina); Fleming, supra, pp. 287 (Mississippi), 293 North Carolina), 311 (Texas).

46/ Fleming, supra, p. 289 (Mississippi).

47/ Id. pp. 273, 274 (Alabama), 288 (Mississippi).

48/ Id. pp. 275 (Arkansas), 277-78 (Florida), 311 (Tennessee), 312 (Texas).

49/ Id. pp. 275 (Arkansas), 311 (Tennessee).

50/ Id. p. 275 (Arkansas).

must have been aware, was the elimination of the provisions on labor and vagrancy, often racially neutral on their face, which had the effect of perpetuating the inferior status to which black workers had earlier been consigned because of their race.

This construction of the 1866 Act is confirmed by the responses to the Black Codes of the military officials in charge of the union forces then occupying the south. With the knowledge and approval of the Thirty-Ninth Congress, commanding generals annulled provisions of the Black Codes in Mississippi, Virginia, Alabama, North Carolina and South Carolina.[51/] This action was not limited to the expressly racial provisions of those Codes; in South Carolina, for example, General Sickles' orders invalidated the racially neutral provisions of the state's laws which punished as vagrants people who could not find work, authorized corporal punishment for disobedient employees, and precluded workers from taking a new job without the approval of their

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51/ Cong. Globe, 39th Cong., 1st Sess., pp. 39, 111, 603 (remarks of Rep. Wilson), 1123 (remarks of Rep. Cook).

former employer.[52/] In striking down the Virginia vagrancy law, General Terry, in an explanation quoted in part by Senator Trumbull during the debates on the Civil Rights Act,[53/] made no reference to the motives of the legislature, but considered only the fact that "[t]he ultimate effect of the statute will be to reduce the freedmen to a condition of servitude worse than that from which they have been emancipated -- a condition which will be slavery in all but its name."[54/]

52/ McPherson, supra, pp. 36-37, ¶¶IV, XIII, XVII.

53/ Cong. Globe, 39th Cong., 1st Sess., p. 1759.

54/ This is the passage quoted by Senator Trumbull. The more detailed explanation which preceded was as follows: "In many counties of this State meetings of employers have been held, and unjust and wrongful combinations have been entered into for the purpose of depressing the wages of the freedmen below the real value of their labor, far below the prices formerly paid by masters for labor performed by their slaves. By reason of these combinations wages utterly inadequate to the support of themselves and families have, in many places, become the usual and common wages of the freedmen. The effect of the statute in question will be, therefore, to compel the freedmen, under penalty of punishment as criminals, to accept and labor for the wages established by

It is thus clear that Congress did not intend that the prohibition of the 1866 Civil Rights Act be limited to instances where racial motive could be proven, but was concerned about whether the consequence of a particular law or practice was to render blacks significantly less able to enjoy the rights exercised by whites. This Court need not in this case decide all possible legal questions which might arise from this aspect of the Act. It is sufficient for the disposition of this case to hold that a practice which prevents such equal enjoyment by perpetuating past intentional discrimination is forbidden by section 1981. That was clearly the impact of the Black Codes, for their readily perceived coercive effect on blacks, and relatively minor effect on whites, derived from the drastically different social, economic and educational status of black and white workers,

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54/ Cont'd.

these combinations of employers. It places them wholly in the power of their employers, and it is easy to foresee that, even where no such combination now exists, the temptation to form them offered by the statute will be too strong to be resisted, and that such inadequate wages will become the common and usual wages throughout the State." McPherson, supra, p. 42.

which was in turn rooted in a century of slavery and discrimination.

This construction of section 1981 accords with the established construction of the Fourteenth Amendment. This Court has repeatedly held that neutral state practices which perpetuate the effects of past intentional discrimination are themselves unlawful. A school board which earlier assigned students on the basis of race remains in violation of the Constitution if it adopts a policy of reassigning students each year to the school they attended previously, subject only to a transfer procedure whose burdens are so great as to lock students into their original school. Green v. School Board of New Kent County, 391 U.S. 430 (1968). A geographic assignment plan that "appears to be neutral" is unlawful if it maintains in operation "the continuing effects of past school segregation." Swann v. Charlotte-Mecklenburg Board of Ed., 402 U.S 1, 28 (1971). So long as a past act of intentional discrimination caused the present assignment of a worker or student, the "remoteness in time" of the past intentional conduct is irrelevant to the legality of present practices which perpetuate its impact.

Keyes v. School District No. 1, 413 U.S. 189, 210-211 (1973). A state which in an earlier period refused to permit blacks to register to vote cannot thereafter adopt a "neutral" policy of prohibiting registration now by persons who failed to register during that earlier time. Lane v. Wilson, 307 U.S. 265 (1939). See also Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178-79 (1972). So long as a state practice perpetuates the effect of past discrimination the state is in violation of the Constitution, regardless of whether that practice was adopted in good faith.

The application of written tests such as those administered by petitioners will operate to differentiate among applicants not primarily, if at all, on the basis of their innate ability, but also, and perhaps solely on the basis of the education which they have received. In Gaston County v. United States, 395 U.S. 285 (1969), this Court recognized that as a practical matter "among black children compelled to endure a segregated and inferior education, fewer will achieve any given degree of literacy than will their better educated white contemporaries." 395 U.S. at 295.

Gaston County drew that inference where the examination involved tested mere literacy; the quality of an applicant's education is of far greater importance where, as here, the examination tests more complex verbal and mathematical skills. If black and Mexican-American applicants were denied equal educational opportunities while young, the "[i]mpartial administration of the ... test today would serve only to perpetuate these inequities in a different form." 395 U.S. at 297. Practices which thus perpetuated the effect of past discrimination in education would have been particularly obnoxious to the Congress which enacted the Fourteenth Amendment and the 1866 Civil Rights Act; that Congress was fully aware of the fact that prior to the Civil War the Slave Codes of most states forbade teaching slaves, and in some cases even freedmen, to read and write, and that similar prohibitions were still in effect in 1866. Brown v. Board of Education, 347 U.S 483, 490 (1954).[55/]

55/ Cong. Globe, 39th Cong., 1st Sess., pp. 39 (remarks of Rep. Wilson), 474 (remarks of Sen. Trumbull. Prior to the Civil War, teachers were actually jailed for instructing black children to read. H. Commager, Documents of American History, pp. 327-29 (7th Ed.). After the Civil War the Ku Klux Klan threatened and murdered northerners who

Petitioners' written examinations perpetuate the discriminatory effect of a century of purposeful racial segregation of California public schools. See Regents of University of California v. Bakke, 57 L.Ed.2d 750, 822 (opinion of Justices Brennan, White, Marshall and Blackmun)(1978). Soon after the first public "colored school" was opened in San Francisco for black children, California's education law was expressly amended in 1860 to authorize separate schools for "Negroes, Mongolians and Indians."[56/] This statute was repealed in 1880,[57/] following the closing of many of the separate black schools for reasons of economy,[58/] but was replaced in 1885 by a new

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55/ Cont'd.

had the effrontery to teach southern blacks. See Cong. Globe, 39th Cong., 1st Sess., p. 1834 (remarks of Rep. Lawrence); H. Swint, The Northern Teacher in the South, 1862-1870, pp. 94-142; W. Fleming, Documentary History of Reconstruction, v.2, pp. 203-206.

56/ 1860 Cal. Stats., c.329, §8; see also 1863 Cal. Stats., c.159, §68.

57/ General School Law of California, §1662 at 14 (1880).

58/ C. Wollenberg, All Deliberate Speed, Segregation and Exclusion in California Schools 1855-1975, pp. 24-26 (1976).

statute authorizing segregated schools for Chinese, and later Japanese, Mongolian and Indian children.[59/] The state Attorney General subsequently issued an opinion that Mexican-Americans were Indians, and they were thus covered by this legislation[60/]; despite the absence of express statutory authorization for excluding black children from white schools the systematic segregation of blacks continued.[61/] The state segregation laws were not repealed until 1947, but despite that step, and notwithstanding this Court's decision in Brown v. Board of Education, California authorities continued to intentionally exclude black and Mexican-American children from white public schools. Within the last decade 20 major school districts in California,

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59/ 1885 Cal. Stats., c.117, §1602 (Chinese); 1893 Cal. Stats., c.193, §1662 (Indians); 1921 Cal. Stats., c.685, §1 (Japanese).

60/ 22 California Department of Justice, Opinions of the Attorney General, Opinion 6735a (January 23, 1930), 931-32 (1930). See also J. Hendrick, The Education of Non-Whites in California, 1849-1970, p. 87 (1977).

61/ See Hendrick, supra, at 78-80, 98-100.

including Los Angeles,[62] have been found to be in violation of federal or state prohibitions against discrimination.[63] About half of all black and Mexican-American students attending public schools in California in 1970 were in districts operating such segregated schools.[64] The deleterious impact on minority students of this dual system, which Justice Douglas properly characterized as a "classic case of [the] de jure segregation involved in Brown v. Board of Education,"[65] has been conceded by state officials.[66]

62/ See Kelsey v. Weinberger, 498 F.2d 701, 704, n.19 (D.C. Cir. 1974); Crawford v. Board of Education, 17 Cal. 3d 280, 130 Cal. Rptr. 724, 551 P. 2d 28 (1976).

63/ See Brief Amicus Curiae for the NAACP Legal Defense and Educational Fund, Inc., in No. 76-811, Regents of University of California v. Bakke, pp. 13a-15a.

64/ Id., p. 15a.

65/ Guey Heung Lee v. Johnson, 404 U.S 1215, 1215-16 (1971).

66/ See, e.g., Governor's Commission on the Los Angeles Riots, Violence in the City, pp. 49 et

In addition, of black men in California between the ages of 21 and 29, the age limits for eligibility to take the disputed examination, 50% were born in the south.[67] The intransigent refusal of southern school authorities to comply with Brown is well known; voluntary action was rare, and not until after Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969), did the federal courts achieve meaningful desegregation in a substantial number of southern school systems. Black students assigned to black schools in the south suffered not only because of segregation as such, but also because black schools provided in other ways as well an education far inferior to that afforded whites in the same states or elsewhere in the country. In the black schools there was generally a higher pupil-teacher

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66/ Cont'd.

seq. (1965); California Legislative Assembly Permanent Subcommittee on Post Secondary Education, Unequal Access to College (1975). See also United States Commission on Civil Rights, Mexican-American Education Study, Reports I-VI (1971-74).

67/ U.S. Bureau of the Census, 1970 Census of Population, Series PC(2)-2A, State of Birth, p. 156.

ratio and lower per capita expenditures, the teachers were less well trained and had lower salaries, the physical facilities were frequently inferior, and in some cases the academic year was shorter.[68/]

We think it unlikely that in adopting the 1866 Civil Rights Act forbidding state practices which perpetuate the effect of past discrimination Congress intended that the Act would not protect an ex-slave from Virginia if he moved to Georgia. Such a distinction would have had the incongruous effect of forbidding states to apply their vagrancy laws to their own natives, but permitting the states to apply those laws to former slaves from

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68/ State by state statistics on each of these factors were set forth in the Intervenors' Statement Of Material Facts As To Which There Is No Genuine Issue in New York v. United States, No. 2419-71, D.D.C.. Judgment in favor of the intervenors in that case, which involved the applicability to certain New York counties of the Voting Rights Act of 1965, was affirmed by this Court. 419 U.S. 888 (1974). Some of these statistics are reproduced in the Motion of Plaintiffs-Intervenors To Affirm, No. 73-1740, pp. 1a-31a.

other states.[69/] It also would have tended to discourage ex-slaves from moving away from their former masters, one of the primary goals of the Black Codes which Congress deplored. We therefore suggest that the 1866 Civil Rights Act forbids Los Angeles from using a non job-related test which perpetuates the effect of past discrimination regardless of whether that discrimination occurred in California or some other state.

69/ General Terry's decision to annul the Virginia vagrancy laws was premised on the fact that it would have an adverse impact on freedmen due, not to any past discrimination by Virginia, but to "wrongful combinations" by private employers to reduce wages. See n.54, supra. Congressman Windom expressed a similar concern with such private conspiracies, arguing they provided a reason for adopting the Civil Rights Act and annulling the Black Codes. Cong. Globe., 39th Cong., 1st Sess., p. 1160.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be affirmed.

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